



May 22 relating to LSI modems (“May 22 Report”) and May 27 relating to Conexant modems (“May 27 Report”). He then supplemented these initial reports on June 6, 2009. Although Mr. Aronson has styled these reports as “infringement” reports, he fails to perform his own independent analysis of infringement. As he stated in his Report, [REDACTED] [REDACTED] See May 22 Report at 9 (attached as Ex. 1 to the Declaration of David M. Young (“Young Dec.”) submitted herewith). Instead, Mr. Aronson [REDACTED] *Id.* He then purports to offer a concurrence with Dr. Goldstein’s assessment of the patents and the infringement of those patents. May 22 Report at 5 (Ex. 1 to Young Dec.). This type of bootstrapped opinion is wholly improper, cumulative, and an inappropriate use of judicial resources and time and, thus, should be excluded.

HP also seeks an order precluding Plaintiff’s infringement expert Dr. Yuri Goldstein from relying in any way on Mr. Aronson’s opinions and report regarding the source code for the accused modems. Dr. Goldstein acknowledged in his deposition that he did not review any of the source code for the accused products. Moreover, neither Dr. Goldstein’s report nor his declarations make reference to Mr. Aronson’s opinions concerning the source code. Rembrandt never supplemented Dr. Goldstein’s report to refer to Mr. Aronson’s findings or to indicate that Dr. Goldstein relies upon them in any way. Federal authority mandates that evidence or testimony not timely disclosed in an expert report be excluded at trial.

## **I. BACKGROUND FACTS**

As the Court is aware, Rembrandt accuses Defendant HP of infringing various claims of the ’578 patent. Rembrandt retained Dr. Yuri Goldstein to provide expert opinions and testimony regarding the alleged infringement. Dr. Goldstein issued his Infringement Expert Report on March 20, 2009, the date set forth in the Court’s scheduling order for submission of

initial reports of the parties' experts. Dr. Goldstein's Report contains a claim-by-claim, element-by-element analysis of Rembrandt's infringement theories, based upon his underlying allegation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. 2 to Young Dec.). However, Dr. Goldstein admitted that, in formulating his opinions, he did not review or consider the actual source code used in the modems incorporated into the Defendants' products. *See* Transcript of Deposition of Yuri Goldstein, Ph.D. taken on May 27, 2009 ("Goldstein Dep.") at 64:13-65:3 (Ex. 3 to Young Dec.).

More than two months after the Court's deadline for initial reports, on May 22 and May 27, Plaintiff's expert Mr. Aronson submitted purported initial Infringement Reports directed to analysis of the source code used in the accused LSI modems (May 22 Report) and accused Conexant modems (May 27 Report). He then supplemented both of these reports on June 6. Although Mr. Aronson labeled these reports as "Infringement" Reports, he made clear that he did not perform his own independent analysis of infringement: [REDACTED]

[REDACTED] May 22 Report at 9. (Ex. 1 to Young Dec.) Instead, he states that he [REDACTED] *Id.* He then purports to offer a concurrence and substantiation of Dr. Goldstein's conclusions. May 22 Report at 5, 8.

Mr. Aronson's purported "Infringement" Reports do not contain any evaluation of claim construction, which is the first step in a legally-proper infringement analysis. Nor do the Reports provide any analysis concerning how identified sections of LSI or Conexant source code satisfy the patent claim limitations. Mr. Aronson acknowledged in his deposition that a detailed claim construction and infringement analysis was beyond the scope of the tasks to which he was

assigned. Transcript of Deposition of Barry Aronson - LSI, June 11, 2009 (“Aronson LSI Dep.”) at 9:6-15:8 (Ex. 4 to Young Dec.).

In contrast, Dr. Goldstein purported to conduct a claim-by-claim, element-by-element analysis of Rembrandt’s infringement theories, although he acknowledged that he did not review the source code associated with the accused products. Goldstein Dep. at 64:13-65:3 (Ex. 3 to Young Dec.). Moreover, Dr. Goldstein’s Report makes no reference to Mr. Aronson’s analysis of the source code for the accused products. Nor did Dr. Goldstein supplement his Report to reference Mr. Aronson’s analysis.

## II. ARGUMENT

### A. Mr. Aronson’s “Infringement” Opinions Should be Excluded

Rule 702 of the Federal Rules of Evidence states that expert opinion testimony is admissible only if it helps the judge or jury understand the facts: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert... may testify thereto in the form of an opinion.” Significantly, “[t]he adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90 (1993) (“Daubert”). “Indeed, the Supreme Court has charged trial judges with the responsibility of performing a gate-keeping function to ensure that all expert testimony, including scientific testimony, is not only relevant, but also **reliable**. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (extending the basic gate-keeping obligation for ‘scientific’ testimony established in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993), to all expert testimony).” *Biovail Corp. Int’l v. Andrx Pharm., Inc.*, 239 F.3d 1297, 1303 (Fed. Cir. 2001) (emphasis added).

Any opinion testimony by Mr. Aronson in this case concerning infringement by the modems whose source code he reviewed would clearly be outside permissible grounds. Mr. Aronson himself admitted that he did not do a proper infringement analysis. His purported “infringement” opinions – to the extent he has any— thus cannot be grounded in methods and procedures of science nor are they founded upon the appropriate legal principles. Here is the relevant testimony from his deposition:

A series of 15 horizontal bars of varying lengths, all black, representing a data series. The bars are arranged in a list format, with some bars having small vertical markers at their ends.

[REDACTED]

Aronson Dep. at 11:21-13:16 (Ex. 4 to Young Dec.).

Thus, Mr. Aronson's opinions lack the proper foundation in the law. To allow Mr. Aronson to testify as to infringement, or to testify somehow that his opinions or his review of the source code "supports" a finding of infringement, where such an opinion has no proper legal or factual foundation, would be unfairly prejudicial to HP and would only confuse the jury. Because Mr. Aronson's opinions lack the proper legal foundation, they should be excluded. *See Hebert v. Lisle Corp.*, 9 F.3d 1109, 1117 (Fed. Cir. 1996).

There is another basis supporting the exclusion of Mr. Aronson's testimony. Expert testimony that is merely cumulative of other expert testimony may be precluded. Fed. R. Evid. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* *See also Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 335 (4<sup>th</sup> Cir. 2001) (upholding the exclusion of a plan that cited and summarized other reports that had been admitted into evidence); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1221 (4<sup>th</sup> Cir. 1983) (upholding the disallowance of cumulative evidence).

Trial courts have broad discretion to prevent the introduction of cumulative evidence. The United States Supreme Court has noted that a "District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body." *Hamling v. United States*, 418 U.S. 87, 127 (1974). This power to exclude evidence is widely used to prevent unnecessarily cumulative expert testimony. *See, e.g., Coles v. Jenkins*, 34 F. Supp.2d 381, 383 (W.D. Va. 1988) (preventing the cumulative testimony of three expert witnesses); *Nationwide Mut. Ins. Co. v. LaFarge Corp.*, 1994 U.S. Dist. LEXIS 3851, at

\*6 (D. Md. 1994) (disallowing multiple experts to opine on the same topic) (unpublished) (attached as Ex. 5 to Young Dec.).

Dr. Goldstein's claim-by-claim, element-by-element opinions on alleged infringement are set forth in his March 20 Report. Mr. Aronson does not offer his own infringement opinions and instead adopts Dr. Goldstein's opinions on these issues. May 22 Report at 9.

Although Mr. Aronson did not perform an infringement analysis, he purports to [REDACTED]

[REDACTED] May 22 Report at 5 (Ex. 1 to Young Dec.). Such concurring opinions are entirely cumulative of those rendered by Dr. Goldstein, and are themselves without foundation for the reasons already stated, *i.e.*, that Mr. Aronson failed to perform his own infringement analysis and relies entirely upon Dr. Goldstein's opinions.

**B. Dr. Goldstein Should be Precluded From Providing Testimony at Trial Not Previously Disclosed in his Report**

Federal Rule of Civil Procedure 26(a)(2)(B) requires an expert witness to provide a report containing, among other things: (1) a complete statement of all opinions to be expressed by the expert witness; (2) the basis and reasons for all such opinions; (3) the data or other information considered by the expert witness in forming the opinions; and (4) any exhibits to be used as a summary of, or support for, the opinions. Fed. R. Civ. P. 26(a)(2)(B). These rules of expert disclosure are designed to allow an opponent the opportunity to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts. *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 598 (4<sup>th</sup> Cir. 2003).

To prevent a party from neglecting its disclosure duties, the Federal Rules of Civil Procedure also provide that any testimony not properly disclosed in a Rule 26 expert report shall not be admissible as evidence at trial. *See* 1993 Amendments to Fed. R. Civ. P. 37(c)(1)

(“Paragraph (1) prevents a party from using as evidence any evidence, witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1)”); *see also Southern States Rack and Fixture*, 318 F.3d at 595-96 (affirming the district court’s decision to exclude testimony from one of Southern States’ witnesses concerning a new opinion that the expert formed during trial: “[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) is not, unless such failure is harmless, permitted to use as evidence at trial... any witness or information not so disclosed.”).

Compliance with Rule 26(a)(2) is thus a condition precedent to the use of expert testimony at trial. *See, e.g., Grajales-Ramero v. American Airlines, Inc.*, 194 F.3d 288 (1st Cir. 1999); *see also Harlow v. Eli Lilly & Company*, 1995 WL 319728 at \*2 (N.D. Ill. 1995).

HP asks the Court to limit Dr. Goldstein to only those opinions given in his expert report and declarations. Thus, Dr. Goldstein should be precluded from commenting or relying on the source code for the accused modems or on Mr. Aronson’s analysis of the source code as he failed to consider the source code in his Report and declarations and made no reference to Mr. Aronson’s analysis in his Report or declarations.

### **III. CONCLUSION**

For the reasons stated above, Defendant HP asks the Court to preclude Rembrandt from offering opinions of Mr. Aronson on infringement issues, since his opinions are unreliable and, moreover, entirely cumulative of Dr. Goldstein’s opinions. HP also asks that the Court preclude Rembrandt from offering opinions of experts that are not disclosed in their expert reports or stipulated-to declarations, particularly any opinions by Dr. Goldstein regarding the source code for the accused modems. A proposed Order is submitted with this Motion.



Dated: June 19, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of JUNE, 2009, I will electronically file the foregoing

**(PUBLIC VERSION) HEWLETT-PACKARD COMPANY'S MEMORANDUM IN  
SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE PLAINTIFF FROM  
OFFERING OPINION TESTIMONY FROM MR. ARONSON AND TO PRECLUDE DR.  
GOLDSTEIN FROM RELYING UPON MR. ARONSON'S REPORTS OR OPINIONS**

with the Clerk of Court using CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel. In addition, I certify counsel for Hewlett-Packard will serve the following counsel a copy of this filing via email:

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